
Code 1f State statutes and regulations

FDEP will administer a program at least as stringent existing federal program

Commenter (0410) asserted that the Florida Assumption will grant more localized control over ecological communities, which will allow the FDEP's "capable and passionate staff" to administer a program that will be as stringent if not more stringent than the existing program.

The proposed program is not as stringent as federal law

Commenters (0386, 0429-Christina Reichert, 0429-Marjorie Laurent) opposed the Florida Assumption, claiming that it is not as stringent as federal law. Commenter (0386) stated that the FDEPs rule-making process for developing an assumption program, including the development phase and publication of incomplete proposed rules, is highly flawed. The commenter (0386-A1) pointed to examples, such as the statute section that points out that provisions of state law that conflict with federal law do not apply to state permitting, however, the proposal neither specifies the conflicts nor enacts any changes to resolve conflicts or create a program as stringent as federal law. The commenter (0386-A1) pointed out that FDEP's proposal does not include rationale for proposing the less protective 300-foot buffer and it does not fully describe the state's permitting, administrative, judicial review, and other procedures. Instead, the state's regulations cover methods to be used, conflicts of laws, and coordination between the ERP and Section 404 permitting programs.

The commenter (0386) argued that the program does not adopt or establish compliance with all Section 404(b)(1) guidelines, but relies on a patchwork of state rules and regulations that have additional qualifications and caveats that result in less stringency. The commenter (0386) added that the state's program fails to define terms that appear in 40 CFR 230.3 such as, "waters of the United States." Without clear definition, commenter (0386) says it is unclear how the state will choose to define such terms. In particular, the commenter (0386) notes the word "pollution" covers only pollution that is at a high enough concentration to be potentially harmful, which could limit the number activities that fall under federal's regulation. The commenter (0386) explained that the state's definition of "mixing zone" allows for a broad definition that would result in a less stringent state program. Commenter (0386) noted that Florida's definitions of "dredge material" and "fill material" are unclear, and the latter is based on the function it performs rather than its physical state.

Commenter (0386) noted that the Florida Assumption adds qualifying language to General Procedures to be followed (40 CFR 230.5) that restricts the permitting conditions that FDEP must address when issuing a state Section 404 permit, resulting in less restrictive consideration of chemical contamination.

Florida law does not have comparable access to the courts as federal law

Commenter (0386) stated that Florida law does not have access to the courts that federal law has, therefore making the state unfit to assume permitting responsibility. Commenter (0386) says that FDEP fails to include any of the state's several features that make Florida's administrative and judicial review procedures more restrictive than federal law. The commenter (0386) pointed out that the Florida statutes allow only citizens of the state that are adversely affected to intervene during proceedings brought under this statute, in contrast to federal law that authorizes any citizen to intervene during proceedings.

Commenter (0386) stated that mandatory fee shifting under Fla. Stat. § 403.412 is a barrier to court access for litigants unwilling or unable to risk an adverse fee award, which is not mandatory under federal law. The commenter (0386) added that Florida's Administrative Procedure Act restricts access to courts by limiting the ability to establish standing to those who show harm to substantial interests of a substantial number of members. Under federal law, associational standing may be established on the basis of a single member's harms from the challenged conduct. Commenter (0386) disagreed with the Florida Assumption on the basis that Florida's more restrictive access to the courts would deprive affected parties of the ability to vindicate rights and ensure citizen enforcement.

A percentage of Section 404 permits should be reviewed annually by EPA and USACE

Commenter (0430-Kurt Spitzer) suggested that the rules be amended to require a certain percentage of the permits issued under the delegated program be reviewed for consistency with the criteria and conditions of the project's permit. This could also include a check of the project's consistency with state and federal policy and water quality standards.

Commenter (0419) recommended that a regular review of Section 404 permits issued by the State be specifically included as a part of the agreement between Florida and federal agencies in addition to any other programmatic review as required by federal regulations. Commenter (0419) recommended that at least 10 percent of the projects that have been issued a permit be reviewed by the EPA and USACE annually for consistency with state and federal policy and standards concerning the Section 404 program. Commenter (0419) suggested that the findings of each review be made available to the FDEP and the public.